Supreme Court, U. S.
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No. 79-1581

IN THE

Supreme Court of the United States

COCA-COLA BOTTLING COMPANY OF ARKANSAS
Petitioners,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 878
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Questions presented	1
Statutory provisions involved	2
Argument: Reasons for denying the writ	3
I. The appellate court has not decided an important question of federal law which has not been but should be settled by this Court	3
II. The decision of the appellate court does not conflict with decisions of the United States Supreme Court	7
Conclusion	8
Certificate of Service	9

AUTHORITIES CITED

Cases

Alexander v. Gardner-Denver Co., 415 U.S. 36, (1974)	7
Gateway Coal Co. v. United Mine Workers 414 U.S. 368 (1974)	6
John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543 (1964)	5
Local Union No. 721, United Packinghouse, Food and Allied Workers v. Needham Packing Company, 376 U.S. 247 (1964)	7

N.L.R.B. v. Weingarten, 420 U.S. 251 (1975) 5,7,8

Nolde Brothers Inc. v. Bakery Workers, 430 U.S. 243 (1977) 7

Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Company, 369 U.S. 95 (1962) 6

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 5,7

Statutes

29 U.S.C. §185 2,3

Arbitration Awards

Farmbest, Inc., 44 Lab. Arb. 609 (Karlins, 1965) 6

Grief Bros. Cooperage Company, 42 Lab. Arb. 558 (Daugherty, 1964) 6

Moore's Seafood Products, Inc. 50 Lab. Arb. 83 (Daugherty, 1968) 6

Phelp's Dodge Aluminum, 52 Lab. Arb. 375 (Howlett, 1969) 6

Other Authorities

Cox, "Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482 (1959) 5

Getman, "Labor Arbitration and Dispute Resolution," 88 Yale L. J. 916 (1979) 6

Summers, "Individual Protection Against Dismissal: Time For a Statute, 62 Va. L. Rev. 481 (1976)..... 6

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QUESTIONS PRESENTED

Did the appellate court err when it affirmed the trial court's decision that an arbitrator did not exceed his authority under the terms of a collective bargaining agreement in reinstating a discharged employee because the arbitrator found that Coca-Cola Bottling Company of Arkansas acted without just cause since it failed to give the employee an opportunity to present his side of the case prior to discharge?

STATUTORY PROVISION INVOLVED

29 U.S.C. §185 (a)

> . . . Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. The Appellate Court Has Not Decided an Important Question of Federal Law Which Has Not But Should Be Settled By This Court.

This is an action to enforce an arbitrator's award filed under §301 of the amended National Labor Relations Act, 29 U.S.C. §185. The Company discharged an employee, Ray Lievsay, on the grounds of dishonesty. Lievsay filed a grievance alleging that he had been unjustly discharged. The union submitted the grievance to arbitration pursuant to article seven of the collective bargaining agreement which imposed limitations upon the company's right to discipline employees. Article seven provides in pertinent part:

> The Employer shall not discharge suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union; PROVIDED, no warning need be given to an employee before discharge if the cause of the discharge is dishonesty

Therefore, the issues before the arbitrator were whether the discharge of Lievsay was for just cause and if not, the proper remedy. On March 8, 1977 the arbitrator issued his decision which provided in pertinent part:

> . . . that the termination of Lievsay was for just cause *provided* due process was followed in handling the discharge. But the Company's action was marked by a serious defect in that it appears that Management did not give the grievant adequate opportunity to present his side of the case before discharging him . . . .

> I conclude that the discharge of Lievsay was not for just cause but that no time for pay lost is appropriate.

By implication, the arbitrator concluded that the term just cause created certain procedural standards which must be followed prior to discharge. Specifically, the arbitrator found that the company must give an employee an opportunity to give his account of the matter with which he is charged prior to discharge.

The company contends that it is an impermissible construction of the collective bargaining agreement to read procedural due process requirements into the just cause standard because article seven of the agreement states that no warning notice is required if an employee is discharged for dishonesty. Further, the company contends that the arbitrator exceeded the authority granted him under article nine of the collective bargaining agreement which provides that an arbitrator is governed and limited by the express provisions of the agreement. It is the company's position that if the contract is silent as to any procedural prerequisites, then the arbitrator is impermissibly adding to the terms of the contract and is instead dispensing his own brand of industrial justice. However, both the trial court and the appellate court concluded that no modification of the agreement had occurred, but rather the arbitrator had looked to the industrial common law to interpret the agreement and to resolve a contractual ambiguity since the phrase just cause was not defined in the agreement.

It is respondent's position that the company has erroneously construed the warning notice provisions in article seven of the agreement. Rather than being a definition of just cause, the requirement of written warning notices indicates that the parties have adopted a system of progressive discipline for which an employee may not be discharged for a single act of misconduct unless it is one of the violations specifically enumerated in article seven of the agreement. For these offenses specifically set forth in article seven, a single act of misconduct may justify

suspension or discharge. Therefore, article seven does not define the phrase just cause. This is not at all unusual.

According to Archibald Cox, many provisions of labor agreements such as the principle of just cause must be expressed in general terms since it is impossible to spell out every detail of life in an industrial establishment. Therefore, arbitrators in interpreting labor agreements regularly base awards upon some foundation other than the language of the contract in order to give meaning to general phrases by the development of subordinate rules. The agreement is the ultimate source of rights, but it generally does not provide the actual criteria of decision. Cox, "Reflections Upon Labor Arbitration," 72 HARV. L. REV. 1482, 1491-93 (1959). This Court has also previously approved the practice of arbitrators going outside the collective bargaining agreement to the industrial common law to resolve contractual ambiguities and to give meaning to words and phrases not defined in the agreement. In *United Steelworkers of America* v. *Enterprise Wheel and Car,* 363 U.S. 593, 596 (1960), the Supreme Court discussed the sources of law upon which the arbitrator may draw in reaching a decision:

> The arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

The Supreme Court has also described a collective bargaining agreements as a generalized code to govern a myriad of cases which the draftsmen could not wholly anticipate and which call into being a new common law of a particular industry or of a particular plant. *John Wiley and Sons, Inc.* v. *Livingston,* 376 U.S. 543, 550 (1964). Further, in *NLRB* v. *Weingarten,* 420 U.S. 251, 267 (1975), the Supreme Court appeared to approve the practice of arbitrator's sustaining the employee's right to union representation at investigatory interviews which an

employee reasonably believes might lead to discipline even though such a right was not explicitly provided for in the collective bargaining agreement. In addition, this Court has held that although the collective bargaining agreement did not contain a no strike clause, one would be implied where the agreement made arbitration the exclusive and compulsory means of resolving disputes. *Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Company,* 369 U.S. 95 (1962) and *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368 (1974). By analogy, then it is not improper for an arbitrator to look outside the agreement to develop a standard with which to judge the discharge since the contract is silent as to the definition of just cause. The fact that the contract is silent does not mean that the arbitrator is adding to or violating the express terms of the agreement.

The arbitrator's construction of the phrase "just cause" to include the requirement that the company afford the grievant an opportunity to present his side of the case prior to discharge is not a departure from the definition of the phrase given by numerous other arbitrators. See *Grief Bros. Cooperage Company,* 42 Lab. Arb. 555, 558 (Daugherty, 1964) which defines just cause. *Moore's Seafood Products, Inc.,* 50 Lab. Arb. 83 (Daugherty, 1968), *Farmbest, Inc.,* 44 Lab. Arb. 609 (Karlins, 1965) and *Phelps Dodge Aluminum,* 52 Lab. Arb. 375 (Howlett, 1969). See also Getman, "Labor Arbitration and Dispute Resolution," 88 *Yale L.J.* 916, 921 (1979) and Summers, "Individual Protection Against Dismissal-Time for a Statute," 62 *Va. L. Rev.* 481, 500 (1976).

Since numerous decisions in the *Labor Arbitration Reports* published by the Bureau of National Affairs for over 15 years have held that the phrase just cause does imply procedural requirements, any sophisticated practicioner of labor law would be aware of the interpretation placed upon the phrase by numerous arbitrators. The appellate court's decision therefore would have no widespread effect or cause uncertainity as to the

procedures an employer should follow in disciplining employees. Further, if an employer did not wish to be bound by procedural protections, he could make that an issue for collective bargaining and either define just cause or specifically exclude procedural protections. When parties agree to a collective bargaining agreement containing an arbitration clause they must be deemed to have been conscious of the federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements. *Nolde Brothers Inc.* v. *Bakery Workers,* 430 U.S. 243, 254 (1977).

II. The Decision of the Appellate Court Does Not Conflict With Decisions of the United States Supreme Court

Petitioners also contend that the appellate court's decision conflicts with decisions of the United States Supreme Court concerning the role of an arbitrator and the rights of an employer to investigate the conduct of their employees on the job. Specifically, petitioner cites *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), *United Steel Workers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960) and *NLRB* v. *Weingarten, Inc.,* 420 U.S. 251 (1975). Nothing in these three decisions however, conflicts with the appellate court's decision now before the Court. The quotations from both *Gardner-Denver* and *Enterprise Wheel and Car* say nothing more than that it is the function of the arbitrator to interpret and apply the collective bargaining agreement. In *Local Union No. 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Company,* 376 U.S. 247, 252, 84 S. Ct. 773, 776, 11 L. Ed. 2d 680 (1964), this Court stated that the issue of whether an employee was terminated for just cause involved the interpretation or application of the collective bargaining agreement. Further, the Court in *Weingarten, Inc.,* did not have before it the issue of whether an arbitrator had exceeded his authority under a collective bargaining agreement.

The Court was concerned with a statutory right apart from whatever contractual rights an employee might receive through the process of collective bargaining.

In addition, in the *Weingarten* case, the Court is discussing a statutory right of the employee to make a choice of whether he wants to forego participation in an investigatory interview. The case does not, as petitioner contends, give the employer a statutory right not to hold any type of investigatory interview. Only if the employee insists on having a union representative present is the employer free to act on whatever information he had without an employee interview. Union representation was not an issue in the present case since the company merely handed Lievsay a letter of discharge without attempting to get his side of the case.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of May, 1980 served copies of the foregoing Brief for Respondent in Opposition by depositing them postage prepaid in the United States Mail addressed to E. Harley Cox, Jr., Counsel for Petitioner, Coleman, Gantt, Ramsey and Cox, P.O. Box 8509, Pine Bluff, Arkansas 71611.

Melva Harmon Kozinsky